

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case Number: 1:12-cv-00257-JB-LFG

LARRY GOLDSTONE,
CLARENCE G. SIMMONS, III
and JANE E. STARRETT,

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Local Rule of Civil Procedure 7.8(b) and in further opposition to the Motion to Dismiss of Jane Starrett, Plaintiff Securities and Exchange Commission submits this Notice of Supplemental Authorities to raise with the Court a significant decision that has recently come to Plaintiff's attention.

SEC v. Sells, No. C 11-4941 CW, 2012 WL 3242551 (N.D. Cal. Aug. 10, 2012), provides further support for finding that schemes such as that alleged here properly state a cause of action under subsections (a) and (c) of Rule 10b-5. See Plaintiff's Surreply to Defendant Jane Starrett's Reply in Support of Motion to Dismiss (Dkt # 63) at 7. In that case, Judge Wilken made it clear that actions supporting a scheme need not be unrelated to any alleged misstatement, finding that the Plaintiff had adequately alleged a scheme despite the fact that the "purpose of Defendants' improper actions may have been to increase Hansen's sales and income figures, which they knew would be reported to the public . . ." *Id.* at *7. In finding the scheme adequately alleged, the court noted that "the deceptive conduct alleged by the SEC goes beyond the making of material

misstatements or omissions.” *Id.* The case is also significant because, as here, the acts taken in furtherance of the scheme included making misstatements to outside auditors. *Id.* at ** 2-3.

Sells rejected an argument based upon *SEC v. Kelly*, 817 F. Supp. 2d 340 (S.D.N.Y.), upon which Ms. Starrett extensively relies. Judge Wilken noted that the *Kelly* court reasoned that imposing liability “for a scheme based upon an alleged false statement, when the defendant did not ‘make’ the statement, would render the rule announced in *Janus [Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011),] meaningless.” *Id.* at 6. The *Sells* court explained that “[a]llowing liability for Defendants’ alleged conduct under Rule 10b-5(a) and (c) would not make *Janus* meaningless because *Janus* did not address these sections. . . .” *Id.* at *7.

Dated: September 10, 2012

/s/ Gregory A. Kasper
Stephen C. McKenna
Gregory A. Kasper
Attorneys for Plaintiff
Securities and Exchange Commission
1801 California Street, Suite 1500
Denver, CO 80202
Ph. (303) 844-1000
email: mckennas@sec.gov
kasperg@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I filed the foregoing document through the CM/ECF system that will send notification of such filing to all counsel of record.

Michael Hoses
Assistant United States Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274
Email: Michael.hoses@usdoj.gov
Local Counsel for Plaintiff Securities and Exchange Commission

Alanna G. Buchanan (alanna.buchanan@wilmerhale.com)
Joel Fleming (joel.fleming@wilmerhale.com)
Wilmer Cutler Pickering Hale and Dorr LLP
950 Page Mil Road
Palo Alto, CA 94304
Phone: (650) 858-6000
Fax: 650-858-6100

Randall R. Lee (Randall.lee@wilmerhale.com)
Jessica F. Kurzban (Jessica.kurzban@wilmerhale.com)
Peiyin Patty Li (Patty.li@wilmerhale.com)
Wilmer Cutler Pickering Hale and Dorr LLP
350 S. Grand Avenue, Suite 2100
Los Angeles, CA 90071
Phone: (213) 443-5360
Fax:

John A. Valentine (john.valentine@wilmerhale.com)
Wilmer cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
Phone: (202) 663-6131
Fax: (202) 663-6363
Attorneys for defendant Larry Goldstone and Clarence Simmons, III

Andrew G. Schultz (aschultz@rodey.com)
Bruce D. Hall (bhall@rodey.com)
Rodey, Dickason, Sloan, Akin & Robb, P.A.
201 3rd Street NW, Suite 2200
P.O. Box 1888
Albuquerque, NM 87102

Attorneys for defendants Larry Goldstone, Jane E. Starrett and Clarence Simmons, III

Jerry L. Marks (jmarks@milbank.com)
Alisa Schlesinger (aschlesinger@milbank.com)
Elena Kilberg (ekilberg@milbank.com)
Paul M. Torres (ptorres@milbank.com)
Robert J. Liubicic (rliubicic@milbank.com)
Milbank, Tweed, Hadley & McCloy LLP
601 S. Figueroa Street, 30th Floor
Los Angeles, CA 90017
Phone (213) 892-4000
Fax: (213) 892-5063

Thomas Arena (tarena@milbank.com)
Milbank, Tweed, Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005
Phone: (212) 530-5000
Fax: (212) 530-5219
Attorneys for defendant Jane Starrett

s/ Gregory A. Kasper
Gregory A. Kasper